

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ATHEER YOUNAN KHOSHABA,

Defendant-Appellant.

UNPUBLISHED

April 11, 2006

No. 257484

Midland Circuit Court

LC No. 03-001667-FH

Before: Kelly, P.J., Jansen and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of carrying a concealed weapon (CCW), MCL 750.227, and driving while license suspended (DWLS), MCL 257.904(1). Defendant was sentenced to 60 days in jail and two years probation for the CCW conviction. His DWLS conviction was enhanced to a second offense, and he was sentenced to a concurrent term of 60 days in jail for that conviction. We affirm defendant's convictions but remand for correction of the judgment of sentence.

Defendant's vehicle was stopped when city of Midland police officer Jeffrey Seger observed him driving in the left lane of a two-lane roadway even though defendant was not passing any traffic on the right. Seger ran defendant's license plate and discovered that the registered owner of the vehicle had a suspended license. Seger approached the vehicle, determined that defendant was the registered owner, and arrested defendant for DWLS. Seger searched defendant's vehicle and found a handgun in the glove box. Defendant did not have a permit to carry a concealed weapon.

Defendant first argues that his Fourth Amendment¹ right to be free from unreasonable searches and seizures was violated by the traffic stop and subsequent search of his vehicle. We disagree. Defendant failed to raise this issue in the trial court; therefore, we review for plain error affecting his substantial rights. *People v Wilson*, 242 Mich App 350, 355; 619 NW2d 413 (2000).

¹ US Const, Am IV.

The Fourth Amendment generally requires the police to obtain a warrant before conducting a search, *Maryland v Dyson*, 527 US 465, 466; 119 S Ct 2013; 144 L Ed 2d 442 (1999), and searches conducted without a warrant are per se unreasonable “subject to a few specifically established and well-delineated exceptions.” *Katz v United States*, 389 US 347, 357; 88 S Ct 507; 19 L Ed 2d 576 (1967). A search incident to an arrest, defined as a contemporaneous search without a warrant of a person arrested and the area immediately surrounding that person, is such an exception. *Chimel v California*, 395 US 752, 763; 89 S Ct 2034; 23 L Ed 2d 685 (1969). The United States Supreme Court held in *New York v Belton*, 453 US 454, 460; 101 S Ct 2860; 69 L Ed 2d 768 (1981), that

when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.

It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach. [Footnotes omitted.]

The Court noted that a container “includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, clothing, and the like.” *Id.* at 460 n 4.

In this case, Seger testified that before he initiated the traffic stop, defendant was driving in the left passing lane of the roadway, while not attempting to pass any vehicles in the right lane.² This is a violation of MCL 257.642(1)(a), which states, in part,

Upon a roadway with 4 or more lanes which provides for 2-way movement of traffic, a vehicle shall be driven within the extreme right-hand lane except when overtaking and passing, but shall not cross the center line of the roadway except where making a left turn.

The statute further states that any violation of this statute is a civil infraction. MCL 257.642(2). The violation of this statute gave Seger reasonable suspicion to stop defendant’s vehicle. *People v Kazmierczak*, 461 Mich 411, 420 n 8; 605 NW2d 667 (2000).

² Seger gave this testimony at the preliminary examination in this case. Seger’s trial testimony indicated that defendant was traveling in the right lane; however, neither party explored this inconsistency. Indeed, the initial reason for the traffic stop was not explored by either party during the actual trial in this case. However, defendant has not shown that the reason for stopping defendant given at the preliminary examination was not valid, and the record suggests otherwise.

Additionally, Seger testified that he ran a computer check of defendant's license plate and discovered that the registered owner of the car had a suspended license. In *People v Jones*, 260 Mich App 424, 427-429; 678 NW2d 627 (2004), this Court held that because drivers do not have a reasonable expectation of privacy in their openly displayed license plates, the police may run a computer check of the license plate without observing a traffic violation. The police may also assume that the driver of a vehicle is the registered owner, unless they have evidence to the contrary. *Id.* at 430. Therefore, the fact that the registered owner of the vehicle had a suspended license, along with the violation of MCL 257.642, gave Seger reasonable suspicion that a crime was being committed.

Once Seger approached the vehicle, he learned that defendant was the registered owner of the vehicle and had a suspended license. At this time, Seger lawfully arrested defendant for DWLS. Accordingly, Seger then could lawfully search the passenger compartment of defendant's car, including the glove box where the gun was found. *Belton, supra* at 460. Because Seger had reasonable suspicion to stop defendant's vehicle, probable cause to arrest defendant for DWLS, and lawfully searched the glove box, there was no basis to suppress the gun found during the search. As such, defendant has not shown any error, let alone plain error, that affected his substantial rights.³

Defendant next argues that the trial court erroneously instructed the jury on DWLS first offense, when defendant was charged with a second offense. He also argues that there was no evidence to support a conviction for DWLS, second offense. Defendant failed to present either argument to the trial court. Consequently, we review for plain error affecting substantial rights. *Wilson, supra* at 353.

MCL 257.904(1) governs the elements of DWLS and states as follows:

A person whose operator's or chauffeur's license or registration certificate has been suspended or revoked and who has been notified as provided in . . . [MCL 257.]212 of that suspension or revocation, whose application for license has been denied, or who has never applied for a license, shall not operate a motor vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of motor vehicles, within this state.

MCL 257.904(3)(b) provides that if a violation occurs after a prior conviction, the sentence is enhanced to "imprisonment for not more than 1 year or a fine of not more than \$1,000, or both." MCL 257.904(8) states:

³ Defendant also claims that he received ineffective assistance of counsel because his trial attorney failed to file a motion to suppress because of an illegal stop. As we conclude that the stop of defendant's vehicle and the subsequent search were proper, defendant's claim of ineffective assistance of counsel does not have merit. *People v Riley (After Remand)*, 468 Mich 135, 142; 659 NW2d 611 (2003).

If the prosecuting attorney intends to seek an enhanced sentence under this section based on the defendant having 1 or more prior convictions, the prosecuting attorney shall include on the complaint and information, or an amended complaint or information, filed in district court, circuit court, municipal court, or family division of circuit court, a statement listing the defendant's prior convictions.

Additionally, MCL 257.904(9) allows a prior conviction to be established at or before sentencing by an abstract of the conviction, a copy of the defendant's driving record, or an admission by the defendant.

It is clear from the language of the statute that a prior conviction is not considered an element of the DWLS offense, but rather an enhancement for the purposes of sentencing. MCL 257.904(9) does not require proof of a prior conviction to be determined at trial, but rather states that the prosecutor must establish a prior conviction "at or before sentencing." Given the plain language of the statute,⁴ we conclude that the jury did not have to be instructed on DWLS, second offense, and the prosecutor did not have to present evidence of a prior conviction at trial.⁵

To sentence defendant for DWLS, second offense, however, there must have been some evidence of a relevant prior conviction, as provided in MCL 257.904(9), presented to the trial court. Defendant argues, and the prosecution concedes, that there was no evidence of a prior conviction presented to the trial court. The prosecutor's concession that no evidence of a prior conviction was presented to the trial court conclusively establishes this fact. See *Bd of Co Rd Commr's for Eaton Co v Schultz*, 205 Mich App 371, 378-379; 521 NW2d 847 (1994), quoting 73 Am Jur 2d, Stipulations, § 1, p 536 (observing that stipulations encompass a "concession made in a judicial proceeding by the parties or their attorneys, respecting some matter incident thereto"). Accordingly, the trial court plainly erred by sentencing defendant for DWLS, second offense, in the absence of any evidence of a prior conviction.

We agree with the prosecution that the proper remedy for this error is to remand this case for amendment of the judgment of sentence to classify defendant's DWLS conviction as a first offense. We reject defendant's position that this remedy would violate double jeopardy protections, specifically the protection against multiple punishments for the same offense. See

⁴ Further, in *People v Weatherholt*, 214 Mich App 507, 510-512; 543 NW2d 34 (1995), this Court interpreted the enhancement provisions of the OUIL statutes, MCL 257.625(11) and (12),¹ which are substantially similar to the enhancement provision of the DWLS statute, to be a sentencing scheme. This Court in *Weatherholt* determined that the jury had no role in determining prior convictions. *Id.* at 509.

¹Currently codified at MCL 257.625(15) and (17).

⁵ Defendant again argues that he received ineffective assistance of counsel because counsel failed to object to the jury instructions and allowed defendant to be convicted without proof of an element of the charge. Again, because we find defendant's arguments lack merit, counsel was not ineffective for failing to object. *Riley, supra* at 142.

People v Nutt, 469 Mich 565, 574; 677 NW2d 1 (2004). There is no reasonable basis to conclude that amending defendant’s judgment of sentence to correct its classification of the DWLS conviction would involve multiple punishments. Amending the judgment of sentence in this regard simply does not subject defendant to any additional incarceration or further punishment.⁶

Defendant finally argues that his trial counsel was ineffective for stipulating to the admission of the “face sheet” of defendant’s driving record to prove the DWLS charge. We disagree. Whether defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). “A judge must first find the facts and then decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel.” *Id.* When, as here, there was no *Ginther*⁷ hearing held in the trial court, this Court’s review is limited to mistakes that are apparent from the lower court record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

Defendant argues that the face sheet of his driving record was inadmissible hearsay, not properly authenticated, and its admission violated his rights under the Confrontation Clause.⁸ After reviewing the exhibit at issue, we conclude that it was not inadmissible hearsay and was properly authenticated. MRE 803(8) allows admission of “[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report” MCL 257.204a requires the Secretary of State to create and maintain a driving record that, among other things, records a suspension of the person’s driver’s license. MCL 257.204a(1)(d). Thus, a driving record compiled by the Secretary of State fits under this hearsay exception. The face sheet was also self-authenticating because it contained the seal of the state of Michigan. MRE 902(1).

We further conclude that the admission of the face sheet of the driving record did not run afoul of the Supreme Court’s holding in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). *Crawford* held that the Confrontation Clause applies only to evidence that is testimonial in nature. *Id.* at 56. The Court noted “[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy.” *Id.* The Court also held that when nontestimonial hearsay is at issue, “an approach that exempted such statements from Confrontation Clause scrutiny altogether” was consistent with the Framers’ approach. *Id.* at 68. The face sheet of a driving

⁶ We note that we do not direct that defendant be resentenced on the DWLS conviction. His 60-day jail sentence was within the scope of punishment authorized by statute for DWLS, first offense. MCL 257.204(2)(a). Because it is evident that defendant has completed that sentence, there would be no point to resentencing defendant for that conviction.

⁷ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

⁸ US Const, Am VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .”).

record is a business record kept by the Secretary of State and is clearly not testimonial evidence. *Id.* at 56. As such, further scrutiny under the Confrontation Clause is not required.

We affirm defendant's convictions, but remand this case to the trial court to correct the judgment of sentence to reflect that defendant's DWLS conviction was a first offense. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ Kathleen Jansen

/s/ Michael J. Talbot